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**IN THE UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION**

ENVIRONMENTAL PROTECTION)
 INFORMATION CENTER,)
)
 Plaintiff,)
)
 v.)
)
 Jack BLACKWELL, in his official capacity)
 as Regional Forester for the Southwest)
 Pacific Region of the United States Forest)
 Service, James D. FENWOOD in his)
 official capacity as Forest Supervisor for the)
 Mendocino National Forest, James F.)
 GIACHINO, in his official capacity as)
 District Ranger for the Grindstone Ranger)
 District of the Mendocino National Forest,)
 and UNITED STATES FOREST SERVICE,))
 an agency of the United States Department)
 of Agriculture,)
)
 Defendants.)

Civil Action No. 03-4396-EMC
 Date: June 9, 2004
 Time: 10:30 a.m.
 Courtroom: C, 15th Floor

**PLAINTIFF'S MOTION FOR
 SUMMARY JUDGMENT AND
 INJUNCTIVE RELIEF**

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 MOTION FOR SUMMARY
 JUDGEMENT AND INJUNCTIVE
 RELIEF**

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
STATEMENT OF THE ISSUES TO BE DECIDED.....	1
STATEMENT OF THE RELEVANT FACTS.....	2
LEGAL STANDARDS.....	5
The Standard of Review for Plaintiff’s Motion for Summary Judgement.....	5
The Standard of Review for Plaintiff’s Motion for Injunctive Relief.....	7
ARGUMENT.....	8
I. THE DIVIDE AUGER TIMBER SALE VIOLATES NEPA.....	8
A. The Forest Service Failed to Take a Hard Look at the Divide Auger Timber Sale’s Cumulative Impacts to Late Successional Wildlife and Wildlife Habitat.....	8
1. NEPA’s Hard Look Requirement.....	8
2. The Forest Service’s Failure to Take a Hard Look at Cumulative Impacts to Late Successional Wildlife & Wildlife Habitat.....	10
B. The Forest Service Failed to Supply a Convincing Statement of Reasons Justifying a Finding of No Significant Impact.....	17
1. The Forest Service’s Duty to Justify a FONSI.....	17
2. The Forest Service’s Conflation of Substantive and Procedural Duties.....	18
3. The Forest Service’s Failure to Justify the FONSI.....	20
C. The Forest Service Failed to Consider a Reasonable Range of Alternatives.....	25
1. The Forest Service’s Obligation to Consider a Reasonable Range of Alternatives....	25
2. The Forest Service’s Unreasonable Range of Alternatives.....	26
D. The Forest Service’s Failure to Diligently Involve the Public.....	28
II. THE DIVIDE AUGER TIMBER SALE VIOLATES NFMA.....	31
A. The Forest Service’s Duty to Ensure Species Diversity and Viability.....	31

1	B. MIS in the Mendocino National Forest.....	32
2	C. The Forest Service’s Failure to Comply with its Viability Duties.....	32
3	1. Concerns Over Northern Goshawk, American Marten, Pacific Fisher, and Northern	
4	Spotted Owl Viability.....	32
5	2. The Forest Service’s Monitoring Duties in the Mendocino National Forest.....	34
6	3. The Proxy on Proxy Approach.....	35
7	CONCLUSION.....	39

TABLE OF AUTHORITIES

CASES

<u>Alaska Wilderness Recreation and Tourism Assn. v. Morrison,</u> 67 F.3d 723 (9 th Cir. 1995).....	7
<u>Amoco Production Co. v. Village of Gambell, Alaska,</u> 480 U.S. 531(1987).....	7
<u>Anderson v. Liberty Lobby, Inc.,</u> 477 U.S. 242, 247-249 (1986).....	6
<u>Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.,</u> 462 U.S. 87, 97 (1983).....	8
<u>Blue Mountains Biodiversity Alliance v. Blackwood,</u> 161 F.3d 1208 (9 th Cir. 1998).....	8, 18
<u>Bob Marshall Alliance v. Hodel,</u> 852 F.2d 1223 (9 th Cir. 1988).....	25
<u>Celotex Corp. v. Catrett,</u> 477 U.S. 317 (1986).....	6
<u>Center for Biological Diversity v. U.S. Forest Service,</u> 349 F.3d 1157 (9 th Cir. 2003).....	9, 26
<u>Chevron U.S.A. v. Natural Resources Defense Council,</u> 467 U.S. 837 (1984).....	7
<u>Citizens Against Toxic Sprays v. Bergland,</u> 428 F. Supp. 908 (D. Or. 1977).....	27
<u>Citizens for a Better Henderson v. Hodel,</u> 758 F.2d 1051 (9 th Cir. 1985)	27
<u>Citizens for Better Forestry v. U.S. Department of Agriculture,</u> 341 F.3d 961 (9 th Cir. 2003).....	29
<u>Citizens to Preserve Overton Park v. Volpe,</u> 401 U.S. 402 (1971).....	6
<u>City of Carmel-By-The-Sea v. U.S. Department of Transportation,</u> 123 F.3d 1142 (9 th Cir. 1997).....	9, 26
<u>Earth Island Institute v. U.S. Forest Service,</u> 351 F.3d 1291 (9 th Cir. 2003).....	6, 9, 28, 29
<u>Forest Conservation Council v. U.S. Forest Service,</u> 66 F.3d 1489 (9 th Cir. 1995).....	8
<u>Forest Guardians v. Forest Service,</u> 180 F.Supp.2d 1273 (D. N.M 2001).....	35, 36
<u>Grand Canyon Trust v. FAA,</u> 290 F.3d 339 (D.C. Cir. 2002).....	7
<u>Idaho Conservation League v. Mumma,</u> 956 F.2d 1508 (9 th Cir. 1992).....	27
<u>Idaho Sporting Congress v. Alexander,</u> 222 F.3d 562 (9 th Cir. 2000).....	8
<u>Idaho Sporting Congress v. Rittenhouse,</u> 305 F.3d 957 (9 th Cir. 2002).....	35, 36
<u>Idaho Sporting Congress v. Thomas,</u> 137 F.3d 1146 (9 th Cir. 1998).....	6, 18, 20, 29
<u>Inland Empire Public Lands Council v. U.S. Forest Service,</u> PLAINTIFF'S MTN. & MEM. FOR SUM. JUDG. AND INJ. REL.	

1	88 F.3d 754 (9 th Cir. 1996).....	32, 35, 36
2	<u>Kern v. U.S. Bureau of Land Management,</u>	
3	284 F.3d 1062 (9 th Cir. 2002).....	8, 10, 12, 20, 31
4	<u>Kootenai Tribe of Idaho v. Veneman,</u> 313 F.3d 1094 (9 th Cir. 2002).....	25, 26
5	<u>Makua v. Rumsfeld,</u> 163 F. Supp. 2d 1202 (D. Ha. 2001).....	20
6	<u>Marble Mountain Audubon Society v. Rice,</u> 914 F.2d 179 (9 th Cir. 1990).....	16
7	<u>Marsh v. Oregon Natural Resources Council,</u> 490 U.S. 360 (1989).....	6
8	<u>Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual</u>	
9	<u>Automobile Ins. Co.,</u> 463 U.S. 29 (1983).....	6
10	<u>Muckleshoot Indian Tribe v. U.S. Forest Service,</u> 177 F.3d 800 (9 th Cir. 1999)	27
11	<u>National Parks and Conservation Assn. v. Babbitt,</u> 241 F.3d 722 (9 th Cir. 2001).....	7, 8, 18
12	<u>National Wildlife Federation v. Babbitt,</u> 128 F. Supp. 2d 1274 (E.D. Cal. 2000).....	19
13	<u>Natural Resources Defense Council v. Morton,</u> 458 F.2d 827 (D.C. Cir. 1972).....	27
14	<u>Neighbors of Cuddy Mountain v. U.S. Forest Service,</u>	
15	137 F.3d 1372 (9 th Cir. 1998).....	10, 11
16	<u>Northern Cheyenne Tribe v. Hodel,</u> 842 F.2d 224 (9 th Cir. 1988).....	7
17	<u>Pacific Coast Federation of Fishermen's Ass'n v. National Marine Fisheries Service,</u>	
18	265 F.3d 1028 (9 th Cir. 2001).....	17
19	<u>Portland Audubon Society v. Lujan,</u> 795 F. Supp. 1489 (D. Or. 1992).....	19
20	<u>Public Citizen v. Department of Transportation,</u> 316 F.3d 1002 (9 th Cir. 2003).....	18
21	<u>Robertson v. Methow Valley Citizens,</u> 490 U.S. 332 (1989).....	29
22	<u>Salmon River Concerned Citizens v. Robertson,</u> 32 F.3d 1346 (9 th Cir. 1994).....	5
23	<u>Save the Yaak Committee v. Block,</u> 840 F.2d 714 (9 th Cir. 1988).....	7
24	<u>Seattle Audubon Society v. Evans,</u> 771 F. Supp. 1081 (W. D. Wash. 1994),	
25	aff'd, 952 F.2d 297 (9 th Cir. 1991).....	19
26	<u>Sierra Club v. Bosworth,</u> 199 F.Supp.2d 971 (N.D. Ca. 2002).....	9, 29
27	<u>Sierra Club v. Martin,</u> 168 F.3d 1 (11 th Cir. 1999).....	35
	<u>Sierra Club v. U.S. Forest Service,</u> 843 F.2d 1190 (9 th Cir. 1988).....	21
	<u>Utah Environmental Congress v. Zieroth,</u> 190 F.Supp.2d 1265 (D. Ut. 2002).....	36
	PLAINTIFF'S MTN. & MEM. FOR SUM. JUDG. AND INJ. REL.	Page iv

1	<u>Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.</u> ,	
2	435 U.S. 519 (1978).....	26

3 STATUTES

4	5 U.S.C. § 552(a)(6)(A)(I).....	30
5	5 U.S.C. § 706.....	6
6	5 U.S.C. § 706(2)(A).....	6, 39
7	5 U.S.C. § 706(2)(D).....	6, 39
8	16 U.S.C. § 1604.....	31
9	16 U.S.C. § 1604(g)(3)(b).....	31
10	16 U.S.C. § 1604(i).....	31, 35
11	42 U.S.C. § 4332(2)(C).....	18
12	42 U.S.C. § 4332(E).....	25
13	42 U.S.C. § 4332(2)(C)(iii).....	25

15 REGULATIONS, COURT RULES, AND POLICIES

16	Council on Environmental Quality, <i>Considering Cumulative Effects Under the National</i>	
17	<i>Environmental Policy Act</i> (1997).....	10, 11
18	Fed. R. Civ. P. 56(c).....	6
19	Forty Most Asked Questions Concerning CEQ's NEPA Regulations,	
20	48 Fed. Reg. 18,026 (March 16, 1981).....	27
21	U.S. Fish and Wildlife Service & National Marine Fisheries Service, Endangered Species	
22	Consultation Handbook, Procedures for Conducting Consultation and Conference Activities	
23	Under Section Seven of the Endangered Species Act (March 1998).....	24
24	66 Fed. Reg. 3206 (January 12, 2001).....	14
25	66 Fed. Reg. 3206-07.....	14
26	36 C.F.R. §§ 219.10(a)-(b).....	31
27	36 C.F.R. § 219.10(e).....	31, 35
	36 C.F.R. § 219.11(d).....	34

1	36 C.F.R. § 219.12(d).....	35
2	36 C.F.R. § 219.19.....	32
3	36 C.F.R. 219.19(a)(1).....	32, 34, 35
4	36 C.F.R. § 219.19(a)(6).....	35
5	40 C.F.R § 1500.1(a).....	8
6	40 C.F.R. §§ 1500.2(d).....	28
7	40 C.F.R. § 1502.14.....	26
8	40 C.F.R. § 1502.24.....	29
9	40 C.F.R. § 1502.3.....	18
10	40 C.F.R. §§ 1502.9(a)-(b).....	28
11	40 C.F.R. § 1506.6(a).....	28
12	40 C.F.R. § 1508.27(a).....	9, 11, 15, 18
13	40 C.F.R. § 1508.27(b).....	9, 11, 15, 18
14	40 C.F.R. §§ 1508.27(b)(3).....	21
15	40 C.F.R. 1508.27(b)(4).....	21
16	40 C.F.R. § 1508.27(b)(10).....	21
17	40 C.F.R. § 1508.7.....	9
18	40 C.F.R. § 1508.8(a).....	9
19	40 C.F.R. § 1508.8(b).....	9
20	50 C.F.R. § 402.01.....	24

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1 Plaintiff Environmental Protection Information Center (“EPIC”) hereby notices this
2 motion for summary judgment and injunctive relief, to be heard before Hon. Edward M. Chen, on
3 Wednesday, June 9, 2004, at 9:30 am, 15th Floor, Courtroom C, at the U.S. Courthouse, 450
4 Golden Gate Avenue, San Francisco, California, 94102.

5 EPIC seeks a declaratory judgment that Defendants (hereafter “Forest Service”) has
6 violated federal laws as specified below and a permanent injunction enjoining the Forest Service
7 from authorizing or allowing any logging or other ground-disturbing activities within the Divide
8 Auger project area pending full compliance with the National Environmental Policy Act
9 (“NEPA”) and National Forest Management Act (“NFMA”).

10 **INTRODUCTION**

11 The Divide Auger Timber Sale threatens to commercially log 6,866 trees – 4.5 million
12 board feet – within ancient forest lands nestled in Thomes Creek’s headwaters between the
13 untrammeled Yolla Bolly – Middle Eel Wilderness and the Buttermilk Late Successional Reserve,
14 a landscape managed to protect wildlife dependent on these ancient forests. To justify the
15 commercial logging, the Forest Service prepared an exceptionally flawed Environmental
16 Assessment (“EA”) that turns a blind eye to these ancient forests’ critical ecological and
17 biological roles. In the process, the Forest Service has run afoul of its legal duties pertaining to
18 the preparation of environmental analyses under the National Environmental Policy Act of 1969
19 (“NEPA”) and the protection of diverse and viable late successional wildlife species under the
20 National Forest Management Act of 1976 (“NFMA”).

21 **STATEMENT OF THE ISSUES TO BE DECIDED**

22 1. Whether the Forest Service failed to take a hard look at the cumulative environmental
23 consequences of the Divide Auger Timber Sale to wildlife and wildlife habitat and therefore
24 violated NEPA.

25 2. Whether the Forest Service failed to consider a reasonable range of alternatives for the
26 Divide Auger Timber Sale and therefore violated NEPA.

1 3. Whether the Forest Service violated NEPA by failing to prepare an Environmental
2 Impact Statement (“EIS”).

3 4. Whether the Defendants failed to afford the public adequate opportunity to participate
4 in the decision-making process for the Divide Auger Timber Sale and therefore violated NEPA.

5 5. Whether the Defendants failed to take necessary actions to ensure the diversity and
6 viability of species in authorizing the Divide Auger Timber Sale and therefore violated NFMA.

7 STATEMENT OF THE RELEVANT FACTS

8 The Divide Auger Timber Sale takes place in the Thomes Creek Watershed within the
9 Mendocino National Forest. AR 4593. Because it falls within the range of the Northern Spotted
10 Owl, a species listed as threatened pursuant to the Endangered Species Act (“ESA”), the
11 Mendocino National Forest is subject to the 1994 Northwest Forest Plan. AR 1986. The
12 provisions of the Northwest Forest Plan are implemented through the Mendocino National Forest
13 Land and Resource Management Plan (“Forest Plan”) dated February 1, 1995. See AR 1924-
14 2164. The Forest Plan establishes:

15 management direction and associated long-range goals and objectives[,] specifies
16 the standards, approximate timing, and vicinity of practices necessary to
17 implement that direction[,] and establishes monitoring and evaluation
requirements needed to ensure that direction is being carried out and to determine
if outputs and effects have been reasonably estimated.

18 AR 1933.

19 Fulfilling one of the Forest Plan’s tasks, the Forest Service completed a Watershed
20 Analysis Report for Thomes Creek Watershed dated April 1, 1997. See AR 2637-2779. The
21 Watershed Analysis is “an important step toward landscape-scale management of forest resources.
22 Watershed analysis has a broad, ecosystem management context, and the analysis is used to assist
23 in decision making under [NEPA].” AR 2641. The Forest Service also completed a Forest-Wide
24 Late Successional Reserve Assessment (“LSR Assessment”) in November of 2000. See AR
25 3343-3464. Late Successional Reserves (“LSRs”) were created under the Northwest Forest Plan
26 to “maintain a functional, interactive, late-successional forest ecosystem. They are designed to

1 serve as habitat for late-successional and old-growth related species including the northern spotted
2 owl.” AR 1615.

3 Based on findings and direction within the Forest Plan, and referencing aspects and
4 conclusions of the Watershed Analysis and LSR Assessment, the Divide Auger Timber Sale was
5 authorized by a June 6, 2003 Decision Notice (“DN”) and Finding of No Significant Impact
6 (“FONSI”). AR 4586. The DN/FONSI was based on an Environmental Assessment (“EA”) See AR 4593-4703. The DN/FONSI
7 conducted specifically for the Divide Auger Timber Sale. AR 4593-4703. The DN/FONSI
8 authorizes the implementation of Alternative C of the EA. AR 4586-4589. Alternative C
9 provides for the commercial logging of 4.5 million board feet (“MMBF”) of predominantly late-
10 successional forest from 21 separate timber units, divided into northern and southern sections, in
11 the Thomes Creek Watershed, with a net total of 264 acres over a project area totaling 2,882
12 acres. AR 4533, 4593. Of the 264 acres, 40 acres would be retained “to provide habitat for old
13 growth wildlife and vegetation.” AR 4593. The Forest Service would apply two methods of
14 logging: (1) 101 acres would be cut using “overstory removal”; and (2) 123 acres would be cut
15 using “green tree retention.” AR 4593, 4604, 4611 (describing silvicultural prescriptions). The
16 proposed action also includes road maintenance and improvement activities on 20 miles of
17 existing roads. AR 4593.

18 The Forest Service’s “Purpose and Need” for pursuing this commercial logging project, as
19 set forth in the EA, is: (1) to produce timber and achieve an even-aged, fire resilient forest while
20 contributing to the economic stability of rural communities; (2) minimize the spread of insect and
21 disease pathogens to prevent adverse impacts to the forest; (3) increase the presence of mixed
22 conifers, decrease the presence of red and white fir, and protect and encourage the growth of oak,
23 all to purportedly maintain healthier stands; and (4) reduce natural fuels to levels manageable by
24 hand crews in the event of fire, in part because the project area is allegedly important to prevent
25 wildfires from reaching the Yolla Bolly – Middle Eel Wilderness. AR 4594-4595.

26 Beyond Alternative C, the chosen alternative, the Forest Service considered two other

1 alternatives. Alternative A, cited as the “no action” alternative, provides for no commercial
2 logging of trees, but, as part of the purportedly pre-authorized baseline, includes pre-commercial
3 thinning projects, the removal of hazard trees along roads, and road maintenance activities. AR
4 4600-4601. Alternative B involves the commercial logging of 1.3 MMBF in 61.15 acres within
5 the southern units of the project area, pre-commercial thinning in the northern units of trees with
6 less than 8.0 inch diameter base height, and road maintenance over approximately 15.6 miles of
7 existing road. AR 4601-4602. The Forest Service identified only three issues with which to
8 assess each alternative: (1) insects and disease; (2) use of the registered fungicide Borax to
9 minimize the spread of disease; and (3) visual impacts. AR 4596, 4597. The EA explicitly
10 dropped “soil erosion and water quality” from further analysis. AR 4597, 4598.

11 In preparing the Divide Auger EA, the Forest Service completed several internal
12 “specialist reports” referenced but not included within the EA. For our purposes, the particularly
13 relevant specialist reports include the: (1) Biological Assessment (“Wildlife BA”) dated March
14 25, 2003 (AR 4411-4446); (2) Wildlife Specialist’s Report (“MIS Report”) dated April 1, 2003
15 (AR 4447-4484); and (3) Biological Evaluation (“Wildlife BE”) dated June 6, 2003 (AR 4530-
16 4584). Additionally, the U.S. Fish and Wildlife Service prepared a Biological Opinion dated June
17 4, 2003. AR 4489-4529. Neither the internal specialist reports nor the Biological Opinion were
18 circulated for public review and comment as part of the NEPA process. AR 4314. Indeed, each
19 of these documents, with the exception of the Fuels Analysis, was completed subsequent to the
20 public review and comment period provided by the Forest Service and initiated on November 6,
21 2002. Id.

22 Another set of documents of particular relevance are the Programmatic Biological
23 Assessment, Road Maintenance and Repair, Mendocino National Forest (“1998 Road BA”), dated
24 July 9, 1998, and its addendums dated September 9, 1998 and February 23, 2001, and the
25 Programmatic Biological Evaluation, Road and Trail Maintenance and Repair, Mendocino
26 National Forest (“2001 Road BE”), dated February 22, 2001. AR 2913-2935 (1998 Road BA),

2936-2938 (addendum I to 1998 Road BA), 3480-3515 (2001 Road BE), 3516-3523 (addendum II to 1998 Road BA). The 1998 Road BA purports to analyze “road maintenance and repair to determine their effect upon federally Threatened and Endangered species, and to determine whether formal consultation or conferencing with the US Fish and Wildlife Service (FWS) is required.” AR 2914. The 2001 Road BE is largely similar, but, instead of analyzing threatened and endangered species, analyzes “Forest Service Region 5 Sensitive species,” and does not determine whether consultation with the FWS is necessary, but, rather, seeks “to determine whether [road maintenance and repair] would lead toward the federal listing on the Endangered Species Act of 1973 as amended.” AR 3481. The 1998 Road BA and 2001 Road BE, as non-NEPA documents, were not circulated for public review or comment. The actions considered by the 1998 Road BA and 2001 Road BE were allowed to proceed based on a Forest Service decision document signed November 8, 1998. SAR 0002.

Throughout the preparation of the Divide Auger EA, EPIC expressed concerns about and participated in the Divide Auger Timber Sale through comments, letters, and Freedom of Information Act Requests. See AR 3880-3886, 3957-3972, 3984-3989, 4002-4003, 4037-4038, 4245-4247, 4316-4334, 4390-4391, and 4404-4406. Based on the Forest Service’s failure to address these concerns, EPIC appealed the DN/FONSI on July 29, 2003. AR 4708. The Forest Service, however, denied EPIC’s appeal on September 11, 2003. AR 4749. To protect the land and wildlife impacted by the Divide Auger Timber Sale, EPIC filed this lawsuit on September 30, 2003.¹

LEGAL STANDARDS

The Standard of Review for Plaintiff’s Motion for Summary Judgment

Summary judgment must be granted where “there is no genuine issue as to any material

¹ Plaintiff has standing to bring this lawsuit, as demonstrated by the Declarations of Cynthia Elkins and Christine Ambrose filed concurrently with this brief. Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1352 n.10 (9th Cir. 1994).

fact and ... the moving party is entitled to judgement as a matter of law.” Fed. R. Civ. P. 56(c). The United States Supreme Court encourages district courts to utilize summary judgement in appropriate cases. Celotex Corp. v. Catrett, 477 U.S. 317, 322-327 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-250 (1986). Plaintiff’s motion raises purely legal issues on undisputed facts, rendering summary judgement appropriate.

Judicial review of Plaintiff’s claims are governed by the Administrative Procedure Act (“APA”), 5 U.S.C. § 706; Earth Island Institute v. U.S. Forest Service, 351 F.3d 1291, 1300 (9th Cir. 2003). Pursuant to the APA, courts “shall ... set aside agency action” found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or “without observance of procedure required by law.” 5 U.S.C. §§ 706(2)(A), (D). According to the Supreme Court, agency action is “arbitrary and capricious”:

if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decisions that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983). In making this determination, courts are to “consider whether the [agency’s] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgement.” Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971); See also Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1149 (9th Cir. 1998). While courts must defer to the informed exercise of agency discretion under § 706(2)(A), “courts must independently review the record in order to satisfy themselves that the agency has made a reasoned decision based on its evaluation of the evidence.” Earth Island Institute, 351 F.3d at 1301 (citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377 (1989)).

Notably, while the Forest Service is afforded deference in interpreting and implementing obligations Congress has specifically entrusted the agency to administer, such as those in NFMA,

1 deference is *not* afforded to the agency's interpretation and implementation of its NEPA duties.
 2 See Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-844 (1984)
 3 (analyzing the validity of Environmental Protection Agency's Clean Air Act regulations, where
 4 that agency was created by Congress to administer the Clean Air Act and other pollution statutes),
 5 Grand Canyon Trust v. FAA, 290 F.3d 339, 342 (D.C. Cir. 2002) ("the court owes no deference to
 6 the FAA's interpretation of NEPA or the CEQ regulations because NEPA is addressed to all
 7 federal agencies and Congress did not entrust administration of NEPA to the FAA alone")
 8 (citations omitted).

9 **The Standard of Review for Plaintiff's Motion for Injunctive Relief**

10 The standard for determining whether to issue a permanent injunction requires a two-part
 11 inquiry. Amoco Production Co. v. Village of Gambell, Alaska, 480 U.S. 531, 542 (1987). This
 12 Court must first determine whether any statute restricts its traditional equity jurisdiction. Id. If no
 13 statute restricts its equity jurisdiction, then this Court must engage in the traditional equity
 14 balancing to determine whether an injunction is appropriate. Id.; accord National Parks and
 15 Conservation Assn. v. Babbitt, 241 F.3d 722, 737 (9th Cir. 2001).

16 The Ninth Circuit has held that "[t]here is nothing in NEPA to indicate that Congress
 17 intended to limit [a] court's equitable jurisdiction." Save the Yaak Committee v. Block, 840 F.2d
 18 714, 722 (9th Cir. 1988), citing Northern Cheyenne Tribe v. Hodel, 842 F.2d 224, 230 (9th Cir.
 19 1988). Accordingly, this Court must consider the traditional bases for injunctive relief, which are
 20 "irreparable injury and inadequacy of legal remedies." Amoco Production Co., 480 U.S. at 542.

21 There is no presumption of irreparable injury when an agency fails to evaluate the
 22 environmental impact of a proposed action. Id. at 545. However, "[e]nvironmental injury, by its
 23 nature, can seldom be adequately remedied by money damages and is often permanent or at least
 24 of long duration, i.e., irreparable." Id. "When the 'proposed project may significantly degrade
 25 some human environmental factor,' injunctive relief is appropriate." National Parks Conservation
 26 Assn. v. Babbitt, 241 F.3d at 737 (quoting Alaska Wilderness Recreation and Tourism Assn. v.

Morrison, 67 F.3d 723, 732 (9th Cir. 1995)). To obtain an injunction in the Ninth Circuit, a party need not prove that irreparable harm will in fact occur – it must show only that injury or harm *might* occur in the absence of the requested injunction. National Parks Conservation Assn. v. Babbitt, 241 F.3d at 737 (enjoining ongoing cruise ship uses because they “might” cause irreparable harm); accord Idaho Sporting Congress v. Alexander, 222 F.3d 562, 568 (9th Cir. 2000) (stating that the “possibility” of irreparable harm from any resumed logging justifies an injunction). Further, where a party demonstrates the possibility of irreparable harm to the environment, and requests an injunction to prevent such harm, any opposing party bears the burden of demonstrating that “unusual circumstances” exist that weigh against the request. National Parks Conservation Assn. v. Babbitt, 241 F.3d at 738 (citing Forest Conservation Council v. U.S. Forest Service, 66 F.3d 1489, 1496 (9th Cir. 1995) (stating in the context of a challenge to forest management guidelines, that timber companies “should be allowed to present evidence to the court that ‘unusual circumstances’ weigh against the injunction sought.”)).

ARGUMENT

I. THE DIVIDE AUGER TIMBER SALE VIOLATES NEPA

A. The Forest Service Failed to Take a Hard Look at the Divide Auger Timber Sale’s Cumulative Impacts to Late Successional Wildlife and Wildlife Habitat

1. NEPA’s Hard Look Requirement

NEPA is “our basic national charter for protection of the environment.” Blue Mountains Biodiversity Alliance v. Blackwood, 161 F.3d 1208, 1215-1216 (9th Cir. 1998) (quoting 40 C.F.R. § 1500.1(a)). As an “action-forcing” mechanism, NEPA is designed to achieve two principle objectives. Kern v. U.S. Bureau of Land Management, 284 F.3d 1062, 1066-67 (9th Cir. 2002). First, to ensure that an agency “consider[s] every significant aspect of the environmental impact of a proposed action.” Id. (quoting Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 97 (1983)). And second, to “ensure[] that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.” Id. “In order to

1 accomplish this, NEPA imposes procedural requirements designed to force agencies to take a
 2 ‘hard look’ at environmental consequences.” Earth Island Institute, 351 F.3d at 1300 (citing Kern,
 3 284 F.3d at 1066). Importantly, “[t]he procedures prescribed both in NEPA and the implementing
 4 regulations are to be strictly interpreted ‘to the fullest extent possible’ in accord with the policies
 5 embodied in the Act ... ‘[g]rudging, *pro forma* compliance will not do.’” Center for Biological
 6 Diversity v. U.S. Forest Service, 349 F.3d 1157, 1166 (9th Cir. 2003) (citations omitted).

7 In taking the requisite “hard look,” federal agencies must assess the direct, indirect, and
 8 cumulative impacts of agency action to the human environment to determine, in terms of both
 9 context and intensity, the impacts’ significance. See 40 C.F.R. § 1508.27(a), (b) (defining
 10 “significantly”). A direct impact is caused by the action itself within the same time and place. 40
 11 C.F.R. § 1508.8(a). An indirect impact is caused by the action, but occurs later in time or farther
 12 removed in distance, although it is reasonably foreseeable. 40 C.F.R. § 1508.8(b). A cumulative
 13 impact is defined as:

14 the impact on the environment which results from the incremental impact of the
 15 action when added to other past, present, and reasonably foreseeable future
 16 actions regardless of what agency (Federal or non-Federal) or person undertakes
 such other actions. Cumulative impacts can result from individually minor but
 collectively significant actions taking place over a period of time.

17 40 C.F.R. § 1508.7. Cumulative impacts must be assessed in “sufficient detail to be ‘useful to the
 18 decisionmaker in deciding whether, or how, to alter the program to lessen cumulative impacts.’”
 19 Sierra Club v. Bosworth, 199 F.Supp.2d 971 (N.D. Ca. 2002) (quoting City of Carmel-By-The-
 20 Sea v. U.S. Dept. of Transp., 123 F.3d 1142, 1160 (9th Cir. 1997).

21 To satisfy its cumulative impact duties, the Forest Service must do two things. First, the
 22 agency must list the past, present, and reasonably foreseeable projects in the area. 40 C.F.R. §
 23 1508.7; Sierra Club v. Bosworth, 199 F.Supp.2d at 982-983. Second, the agency must analyze
 24 these projects in light of the proposed action. Id. If the Forest Service determines that certain
 25 actions are not relevant to assess the cumulative impacts of the proposed action, the agency must
 26 “demonstrat[e] the scientific basis for this assertion.” Id. at 983.

1 The agency's analysis must be detailed; "[g]eneral statements about 'possible' effects and
 2 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive
 3 information could not be provided." Neighbors of Cuddy Mountain v. U.S. Forest Service, 137
 4 F.3d 1372, 1380 (9th Cir. 1998). Without satisfying these requirements, "neither the courts nor the
 5 public, in reviewing the Forest Service's decision[], can be assured that the Forest Service
 6 provided the hard look it is required to provide." Id. at 1380. The importance of cumulative
 7 impacts, especially in the context of the Divide Auger Timber Sale, cannot be underestimated. As
 8 stated by the Ninth Circuit, where an agency fails to assess cumulative impacts, "[s]uch a
 9 restricted analysis would impermissibly subject the decisionmaking process contemplated by
 10 NEPA to 'the tyranny of small decisions.'" Kern, 284 F.3d at 1078 (quoting Council on
 11 Environmental Quality, *Considering Cumulative Effects Under the National Environmental*
 12 *Policy Act*, at 1 (1997) (hereafter "Considering Cumulative Effects").

13 **2. The Forest Service's Failure to Take a Hard Look at Cumulative Impacts to Late**
 14 **Successional Wildlife and Wildlife Habitat**

15 The Divide Auger EA does not fully address the Divide Auger Timber Sale's cumulative
 16 impacts to wildlife and wildlife habitat dependent on late successional habitat.² This failure is
 17 especially problematic because the Divide Auger's project area, nestled in the headwaters of
 18 Thomes Creek, and abutting and between both the Yolla Bolly – Middle Eel Wilderness, and the
 19 Buttermilk LSR, constitutes an important habitat link for late-successional species. See AR 2080
 20 (stating that Three Prong Management Area – where the logging will occur – provides key
 21 wildlife dispersal habitat for the Northern Goshawk, American Marten, Pacific Fisher,³ and
 22 Northern Spotted Owl), 4445-4446 (maps identifying project area). The EA does concede that
 23 "critical [cumulative] effects on wildlife would include fragmentation of habitat and the reduction

24 ² Late successional habitat is defined as timber strata M3P, M3G, M4S, M4P, M4G, M6G, and R4X. See
 25 AR 2686 (defining "late successional"); 4580-4581 (defining timber strata system).

26 ³ The Fish and Wildlife Service determined on April 8, 2004 that the Pacific Fisher warrants protection as a
 27 threatened or endangered species under the ESA, but is precluded by other allegedly higher priority listing actions.

1 of suitable nesting, denning, and/or dispersal habitat for species dependent on mid to late
 2 successional habitat.” AR 4656. However, nothing in the record demonstrates that the Forest
 3 Service took the requisite hard look at the logging project’s cumulative impacts in terms of
 4 context or intensity. See 40 C.F.R. § 1508.27(a), (b) (requiring consideration of both intensity to
 5 determine the significance of impacts)

6 The Forest Service’s cumulative impacts analysis depends largely on the internal Wildlife
 7 BA, MIS Report, and Wildlife BE prepared for the Divide Auger Timber Sale, documents that
 8 were never subjected to public review and comment.⁴ See infra at 28-31 (arguing that the Forest
 9 Service failed to diligently provide for public involvement). In total, the cumulative impacts
 10 analysis with the EA and these underlying internal reports is conclusory, providing only
 11 generalized statements of impacts, and omits an important influence contributing to cumulative
 12 impacts – roads – and thus gives no assurance that the agency “provided the hard look it is
 13 required to provide.” Neighbors of Cuddy Mountain, 137 F.3d at 1380. However, the Forest
 14 Service takes the position that:

15 Continued management in the areas listed above, combined with the Divide Auger
 16 Timber Sale, should not cause a significant drop of population levels for these
 17 species across their range. The majority of the watershed would continue to
 18 provide for late successional dependent species after implementation of this
 project. Current Forest management is directed to maintain dispersal between the
 LSRs and Wilderness’, therefore, future timber sales should not affect the
 dispersal of mid to late successional dependent species across their range.

19 AR 4481. But this conclusion is unsupported by the record. If anything, all the record shows is
 20 that the Forest Service is subjecting Thomes Creek Watershed to “the tyranny of small
 21

22 ⁴ The proper role of internal reports such as the Wildlife BA, MIS Report, and Wildlife BE is exemplified
 23 by the Forest Service’s analysis of the Divide Auger Timber Sale’s potential impacts to Tule Elk. The MIS Report
 24 provides a concise analysis of the impacts of the Divide Auger Timber Sale to Elk, concluding that the only Elk
 25 located on the Forest are located near Pillsbury Lake, that there have been no reported sightings of Elk, and
 26 therefore, in part because of these facts, the “proposed project would not significantly affect this species” AR
 4458. See also e.g., AR 4451 (Acorn Woodpecker), 4453 (Black-Tailed Deer), 4458 (California Thrasher), 4459
 (Pileated Woodpecker), and 4461 (Western Gray Squirrel). The MIS Report satisfied the agency’s NEPA duties by
 assisting the agency in identifying the issues of most importance. This is contrasted to the above-mentioned analyses
 for Northern Goshawk, American Marten, Pacific Fisher, and Northern Spotted Owl which are used, instead, to
 circumvent, *inter alia*, NEPA’s “hard look” duty.

1 decisions” causing an unspecified level of cumulative habitat fragmentation. Kern, 284 F.3d at
2 1078 (quoting Considering Cumulative Effects, at 1).

3 The MIS Report discloses that in the project area’s southern units, past harvests in 1973,
4 1976, and 1988, left “small, isolated patches of suitable habitat,” and logging in “units S1, T2, T4,
5 T5, S6, S7, and S9 would [further] reduce suitable habitat” AR 4466. According to the
6 Wildlife BA, MIS Report, and Wildlife BE, these sales involved the logging of 518 acres. AR
7 4434, 4478, 4570. In the northern units, the MIS Report states that logging within the project area
8 that occurred “in 1967 and 1988 ... caused some fragmentation” and that the proposed logging
9 “would fragment dispersal, [although] suitable habitat would still exist to allow protected
10 movement.” AR 4467. According to the Wildlife BA, MIS Report, and Wildlife BE, these sales
11 involved the logging of 714 acres. AR 4434, 4478, 4570. Additionally, within 1.3 miles of the
12 northern units, logging sales totaling 236 acres occurred in 1968, 1982, 1996, and 1997. Id. What
13 is most revealing about these past sales is that “[i]t is unknown what silvicultural prescriptions
14 were utilized to harvest these sales.” Id. The cumulative impacts analysis also lists three future
15 logging sales planned within the watershed. One sale – Black Bear – is located 10 miles
16 southeast, another – Ball Mountain – is located four miles east, and the final sale – Foreman/Fish
17 – is located within one mile northeast of the southern portion of Divide Auger. AR 4434-4435,
18 4478, 4570. The Foreman-Fish logging sale is the most worrisome because it “could affect the
19 only avenue of dispersal available from the southern portion of Divide Auger.” AR 4478. Little
20 information is available with regard to these sales’ details except that, “[a]cres of harvest and
21 silvicultural treatments have not yet been determined” AR 4478.

22 Based on these past and future logging sales, the MIS Report and Wildlife BE conclude
23 that “[t]he cumulative harvesting of the existing and proposed timber sales, within the watershed,
24 would cause additional fragmentation by reducing the amount of suitable nesting, denning, and
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1 dispersal habitat, for the species dependent on mid to late successional habitat.”⁵ AR 4478, 4570.
 2 Eventually, “[m]ost of the matrix would be harvested, remain at a younger age due to harvesting
 3 rotations, and would not provide late successional denning or nesting characteristics.” AR 4479.⁶
 4 Later, the MIS Report and Wildlife BE state that on private lands, “[o]nly small patches of timber
 5 remain and would not be considered suitable mid to late successional species habitat” and that
 6 “[i]t is highly probable that [the private logging companies] will continue to harvest on their lands
 7 and that suitable late successional species nesting, denning, roosting, and dispersal habitat will not
 8 exist except in areas restricted from harvest by state regulations.” AR 4481, 4572.⁷

9 In addition to federal and private logging, the Wildlife BA, MIS Report, and Wildlife BE
 10 list several other influences on cumulative impacts – fire suppression, recreation, range, “other,”
 11 tribal, state, and local – but these analyses are even more general and conclusory. AR 4435-4437,
 12 4479-4481, 4571-4573. Perhaps the most egregious failure is the complete omission of any
 13 assessment of the cumulative impacts caused by roads.

14 The sole extent of the analysis of roads consists of the following:

15 [m]aintenance would continue annually on Forest system roads and would be
 16 guided by the Programmatic Biological Assessment for Road Maintenance and
 17 Repair (1998a) and its associated Addendum (1998b), and the Programmatic
 Biological Evaluation For Road Maintenance and Repair (2001a) and its
 associated Addendum (2001b).⁸

18 AR 4480. Notably, the Roads BA and BE are not the actual decision documents authorizing the

20 ⁵ The Wildlife BA concludes, similarly, that “cumulative harvesting ... would cause additional
 21 fragmentation ... for the *northern spotted owl*.” AR 4435 (emphasis added).

22 ⁶ The Wildlife BA and BE contain similar language, stating “[m]ost of the matrix ... would not *reach*
 23 *nesting suitability*.” AR 4435, 4570.

24 ⁷ The Wildlife BA states, similarly, that “[i]t is unlikely that the private land would become suitable in the
 future due to intensive management practices.” AR 4437.

25 ⁸ This quote is factually incorrect. Contrary to the statement, the cited 2001 addendum is not an addendum
 26 to the 2001 Road BE, but, rather, a second addendum to the 1998 Road BA. See AR 3516. This is not merely a
 question of semantics: a BA assesses impacts to species listed as threatened or endangered pursuant to the ESA,
 while the BE assesses impacts to Forest Service “sensitive” species.

1 road maintenance and improvement work. Instead, such work is authorized pursuant to a decision
2 document signed on November 8, 1998. SAR 0002.

3 Regardless, there is absolutely no discussion – whether in the EA, the Wildlife BA, MIS
4 Report, Wildlife BE, Roads BA, Roads BE, or roads decision document – of the influence of
5 existing roads within the project area and the broader watershed to cumulative late-successional
6 wildlife and wildlife habitat impacts. Nor is there any discussion of the impacts caused by the
7 proposed road maintenance and improvements. Notably, the Forest Service has developed new
8 road management policies “to provide a more ecological approach to analyzing existing and future
9 road needs.”⁹ 66 Fed. Reg. 3206 (January 12, 2001). These policies were the result of a finding
10 that “[s]cientific evidence compiled to date suggests that roads ... are, in part, responsible for a
11 decline in the quality of fish and wildlife habitat.” *Id.* at 3208.

12 The LSR Assessment itself states that “[r]oad densities can affect habitat quality for many
13 species, including marten, fisher, nesting owls, goshawks, and other species. Roads affect the
14 quality of late successional habitat by increasing erosion, exposing animals to predation, and
15 increasing noise disturbance.” AR 3376. Specifically, for example, road densities are briefly
16 addressed by the BE’s assessment of American Marten and Pacific Fisher, two “Sensitive
17 Species” that the Forest Service tracks “to determine whether proposed activities would result in a
18 trend toward [listing under the ESA].” AR 4531. The Wildlife BE states that “[c]urrent road
19 densities are approximately 5 miles per square mile, which falls under low quality habitat for
20 [marten and fisher]. Road densities at two miles or less, per square mile, is preferred for moderate
21

22 ⁹ The intent behind the development of the roads policies was to:

23 (1) Develop new analytical tools to decide if, and when, new and existing roads are needed to meet
24 resource management objectives; (2) aggressively decommission roads that are determined,
25 through forest planning, implementation of [NEPA], and other analyses, to be damaging to the
26 environment or to be no longer necessary for achieving resource management objectives; and (3)
maintain and improve those important roads that do not compromise healthy lands and waters and
are needed for recreation, rural access, and the sustainable flow of goods and services.

27 66 Fed. Reg. 3206-07.

1 to high quality habitat.” AR 4547, 4550.

2 In total, these troubling statements provide no quantitative detail of the significance – i.e.,
3 the context and intensity – of the cumulative fragmentation to late successional wildlife and
4 wildlife habitat and thus do not constitute the requisite hard look. See 40 C.F.R. § 1508.27(a), (b)
5 (obligating federal agencies, in determining the significance of impacts, to consider both context
6 and intensity). Specifically, the record fails to assess or identify whether fragmentation would
7 occur in particularly sensitive locations relative to the broader Thomes Creek Watershed and the
8 broader landscape, how such fragmentation would affect terrestrial and airborne vertebrate
9 species, whether such impacts would differ between species, the specific role of the Divide Auger
10 Timber Sale in contributing to that fragmentation, the interrelationship between each activity or
11 influence relevant to cumulative impacts, and whether there are mitigation measures and
12 management opportunities that could be implemented to reduce impacts to acceptable levels.

13 This “tyranny of small decisions” – and the concomitant failure of the agency to detail
14 their cumulative impacts – is of considerable concern given that the project area, the headwaters
15 of Thomes Creek, constitutes an ecological and biological link between the Yolla Bolly – Middle
16 Eel Wilderness and the Buttermilk LSR. AR 3409 (stating that connectivity within the Buttermilk
17 LSR is provided, in large part, by the headwaters of Thomes Creek), 4479 (“Critical areas to
18 maintain adequate dispersal habitat in the future would be between LSR RC 309 and the Yolla
19 Bolly Wilderness”). Even though the Buttermilk LSR is allegedly “fully functional,” LSRs, both
20 the large LSRs such as the Buttermilk and the smaller 100 acre LSRs surrounding Activity
21 Centers (“ACs”), function not as “islands,” but rather, and critically, as a cohesive, linked
22 “network.” AR 3351; see also AR 3449 (“100-acre LSRs represent a network of stands of
23 existing late successional habitat that are to be retained in their natural condition with natural
24 processes, such as fire, allowed to function to the extent possible”). Indeed, the definition of a
25 “fully functional” LSR is one that “contain[s] well connected late successional habitat, *and* [is]
26 connected to other LSRs through dispersal habitat for both aerial and ground traversing species.”

1 AR 3360 (emphasis added). This is because the “*distribution and connectivity* of late
2 successional habitat” – not merely its *presence* – “affects species’ ability to disperse and maintain
3 healthy and viable populations.” AR 3380 (emphasis added). In fact, one of the goals within the
4 Thomes Creek Watershed is to “[m]aintain adequate amount *and distribution* of habitat for
5 [threatened and endangered] wildlife species.” AR 2713 (emphasis added).

6 Thus, impacts to the matrix within the Divide Auger project area may cumulatively impact
7 the functionality of the Buttermilk LSR. The Buttermilk LSR, as the largest LSR in the
8 Mendocino National Forest, “is a crucial link between the Yolla Bolly – Middle Eel Wilderness to
9 the north, LSR RC 310 (Grizzly) to the southwest, and RC 311 (Refuge) to the south.” AR 3407.
10 As stated by the Forest Service, the Buttermilk LSR, and the associated Grizzly LSR, “are the
11 most important LSRs found on the Forest in terms of maintaining healthy, mobile populations of
12 late successional habitat dependent species in the Mendocino National Forest” and the Buttermilk
13 LSR, specifically, provides “a late successional habitat link between [the Grizzly LSR], RC 311
14 and the Yolla Bolly – Middle Eel Wilderness.” AR 3411.

15 The Ninth Circuit addressed habitat connectivity in Marble Mountain Audubon Society v.
16 Rice, 914 F.2d 179 (9th Cir. 1990). In Marble Mountain, a Forest Service Timber Sale EIS failed
17 to address the importance of maintaining biological corridors between the Red Buttes Wilderness
18 and the Grider Creek drainage in the Klamath National Forest of northern California and southern
19 Oregon. 914 F.2d at 182. As the Court explained:

20 Biological corridors provide avenues along which wide-ranging animals can
21 travel, plants can propagate, genetic interchange can occur, populations can move
22 in response to environmental changes and natural disasters, and threatened species
can be replenished from other areas.

23 Id. at 180 n.2. The Court held the Forest Service had failed to take the requisite “hard look,”
24 finding in a situation analogous to the facts here, that “[a]lthough the FEIS acknowledges that the
25 Grider drainage is a biological corridor, it does not contain a significant discussion of the corridor
26 issue.” Id. at 182. Here, the Forest Service must assess the cumulative impact to habitat

connectivity caused by the Divide Auger Timber Sale. See also Pacific Coast Federation of Fishermen's Ass'ns v. National Marine Fisheries Service, 265 F.3d 1028, 1035-1037 (9th Cir. 2001) (holding that agency must assess aggregate effect of 128 acre project representing only 1% to 0.1% of the watershed because "[w]ithout aggregation, the large spatial scale appears to be calculated to ignore the effects of individual sites and projects" and, therefore, "if in fact [the agency] disregards the effects of individual projects as 'localized' when they can have significant aggregate effects, it acts arbitrarily and capriciously").

At bottom, the Forest Service failed to take the requisite hard look at cumulative impacts to late successional wildlife and wildlife habitat and the landscape's broader ecological and biological connectivity. Therefore, the Divide Auger Timber Sale is unlawful.

B. The Forest Service Failed to Supply a Convincing Statement of Reasons Justifying a Finding of No Significant Impact

1. The Forest Service's Duty to Justify a FONSI

The Forest Service failed to supply a convincing statement of reasons justifying the FONSI. The Forest Service, in its FONSI for the Divide Auger, concludes that an EIS is unnecessary because, in part, there "are no apparent adverse cumulative or secondary effects ... [t]here will be no adverse impact to any sensitive, threatened, or endangered plant or animal species ... [and] [t]here will be no significant adverse effects" AR 4591-4592; see also AR 4641-4648 (EA discussion of effects relative to significance factors).

This justification, however, is flawed because, as discussed above, the Forest Service failed to take a hard look at the cumulative impacts of the Divide Auger Timber Sale to late successional wildlife and wildlife habitat and thus has not demonstrated that there "are no apparent adverse cumulative or secondary effects." Id.; See supra at 10-17. Two other reasons further undermine the Forest Service's FONSI. First, the agency has conflated its substantive and procedural obligations, and, in the process, not complied with its NEPA duties. Second, and relatedly, the weight of the record strongly suggests that the Forest Service needs to prepare a full

1 EIS because the record does not support a FONSI.

2 NEPA requires a full EIS for any major federal action that *may* significantly affect the
3 environment. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.3. As recognized by the 9th Circuit:

4 We have held that an EIS *must* be prepared if ‘substantial questions are
5 raised as to whether a project ... *may* cause significant degradation to some
6 human environmental factor.’ To trigger this requirement a ‘plaintiff need
not show that significant effects *will in fact occur*,’ raising ‘substantial
questions whether a project may have a significant effect’ is sufficient.

7 Idaho Sporting Congress v. Thomas, 137 F.3d at 1149-1150 (citations omitted) (emphasis
8 in original). An agency, if it decides not to prepare a full EIS, and instead proceeds with an
9 action based solely on an EA and FONSI, “must supply a ‘convincing statement of reasons’ to
10 explain why a project’s impacts are insignificant.” Blue Mountains Biodiversity Project, 161
11 F.3d at 1211 (citations omitted).

12 Significance, for purposes of NEPA, is determined by looking at both the “context” and
13 “intensity” of the proposed action. See 40 C.F.R. § 1508.27(a) (context), (b) (intensity). In
14 assessing “context,” the Forest Service is required to look at different geographic scales and the
15 short- and long-term impacts of the proposed action within those different geographic scales. 40
16 C.F.R. § 1508.27(a). In assessing “intensity,” the Forest Service must look at the severity of the
17 impact based on ten factors. 40 C.F.R. § 1508.27(b). “If [the agency’s] action is
18 environmentally ‘significant’ according to *any* of these criteria, then [the agency] erred in failing
19 to prepare an EIS.” Public Citizen v. Department of Transportation, 316 F.3d 1002, 1023 (9th
20 Cir. 2003) (emphasis in original) (citing National Parks and Conservation Assn., 241 F.3d at 731.

21 **2. The Forest Service’s Conflation of Substantive and Procedural Duties**

22 The FONSI’s conclusion that impacts to wildlife and wildlife habitat will be insignificant
23 is predicated, in part, on the EA which concludes that “no significant effects to wildlife species
24 would result from the proposed activities within the Divide Auger area and therefore, were not
25 specifically addressed under the Divide Auger EA.” AR 4664. To justify this conclusion, the
26 Forest Service essentially asserts that it has complied with the NFMA’s and the Forest Plan’s

1 substantive provisions for late successional wildlife and wildlife habitat – by, e.g., protecting
 2 LSRs, riparian reserves, retaining 15% of the overstory trees within each logging stand, ensuring
 3 viability, and, in the context of threatened and endangered species, obtaining a “no jeopardy”
 4 determination from the Fish and Wildlife Service – and that because these provisions have been
 5 satisfied there are “no significant effects.”¹⁰ See e.g., AR 4646, 4648, 4656, & 4664.

6 This justification is simply wrong. Even if the agency has fully complied with its
 7 substantive duties, although it has not (see at 31-39 (asserting that agency has not complied with
 8 its duty to ensure species diversity and viability)), this does not render environmental impacts –
 9 in particular cumulative impacts – “insignificant” and does not absolve the agency from its
 10 NEPA duties. The courts have previously stated that compliance with one set of legal duties is
 11 not a substitute for compliance with other legal duties. Seattle Audubon Society v. Evans, 771 F.
 12 Supp. 1081, 1093 (W. D. Wash. 1994), aff’d, 952 F.2d 297 (9th Cir. 1991) (noting that “[a]
 13 review of proposed sales by the FWS would not be a substitute for compliance with NFMA”);
 14 Portland Audubon Society v. Lujan, 795 F.Supp. 1489, 1509 (D. Or. 1992) (rejecting agency’s
 15 request for the court to “accept that its consultation with the United States Fish and Wildlife
 16 Service under the [ESA] constitutes a substitute for compliance with NEPA”); National Wildlife
 17 Federation v. Babbitt, 128 F. Supp. 2d 1274, 1302 (E.D. Cal. 2000) (requiring EIS under NEPA
 18 even though mitigation plan satisfied ESA) (citations omitted).

19 This is particularly so in this case because the substantive thresholds established by
 20 NFMA and the Forest Plan are much *higher* than the “may have a significant effect” standard
 21 established for NEPA’s significance threshold. Moreover, NEPA’s procedural duties are
 22 *different*. The Forest Service’s substantive duties are designed to achieve specific goals and
 23 objectives such as protecting a specified acreage of wildlife habitat. The Forest Service’s
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25 ¹⁰ In the specific context of the Northern Spotted Owl, the Wildlife BA, MIS Report, and Wildlife BE, each
 26 of which contain nearly identical cumulative impacts sections, specify that Northern Spotted Owl “matrix Activity
 27 Centers” were unnecessary to support the LSRs and would not affect species viability. AR 4435, 4479, 4571.

procedural duties under NEPA, conversely, are designed to ensure that the agency “consider[s] every significant aspect of the environmental impact of a proposed action” and to “inform the public that it has indeed considered environmental concerns in its decisionmaking process.”

Kern, 284 F.3d at 1066 (citation and quotation marks omitted).

In an analogous situation, the District Court for the District of Hawaii held that an agency’s compliance with the ESA did not absolve the agency from its duty to prepare an EIS:

The Army argues that its FONSI is also largely based on the results of the consultation with FWS that is required by the ESA. The Army asserts that its conclusion that live-fire training will have no significant impact on endangered species in Makua Valley is supported by FWS’s finding that the proposed action is not likely to jeopardize the endangered species in Makua Valley. See Friends of [the] Payette v. [Horseshoe Bend Hydroelectric Co.], 988 F.2d [989] at 994-95 [9th Cir. 1993] (finding that FWS’s approval of a proposed action is one factor in determining whether the proposed action will have an impact on endangered species). *The Army admits that the “no jeopardy” opinion by FWS under the ESA is not equivalent to a finding of no potential impact under NEPA. The “no jeopardy” opinion says that routine training would not likely jeopardize the continued existence of endangered species, provided certain safeguards are implemented. A FONSI, by contrast, must be based on a review of the potential for significant impact, including impact short of extinction. Clearly, there can be a significant impact on a species even if its existence is not jeopardized.*

Makua v. Rumsfeld, 163 F.Supp.2d 1202, 1218 (D. Ha. 2001) (emphasis added). Consequently, the agency has unlawfully conflated its substantive and procedural duties, thus rendering the FONSI unlawful.

3. The Forest Service’s Failure to Justify the FONSI

The fact that the Forest Service has conflated its substantive and procedural duties fatally undermines the agency’s assertion that the Divide Auger Timber Sale will have “insignificant impacts” and any assertion that the Forest Service has taken the requisite hard look at the cumulative impacts of the Divide Auger Timber Sale to late successional wildlife and wildlife habitat sufficient to justify the FONSI. See AR 4586 (FONSI). Indeed, rather than causing insignificant impacts, the Divide Auger Timber Sale raises substantial questions that the logging may cause significant degradation to the environment. See Idaho Sporting Congress v. Thomas, 137 F.3d at 1149-50 (stating that “significance” triggered when “substantial questions are raised

1 as to whether a project ... *may* cause significant degradation ... and that ‘plaintiff need not show
 2 that significant effects *will in fact occur*’” (emphasis added)). At this juncture, the FONSI is not
 3 supported by the administrative record and therefore the Divide Auger Timber Sale should be
 4 vacated until NEPA is fully complied with.

5 There are two glaring failures in the Divide Auger EA in terms of significance. First, the
 6 Divide Auger Timber Sale threatens to violate federal law – specifically, the Forest Service’s
 7 duty under NFMA to ensure the diversity and viability of species. Sierra Club v. U.S. Forest
 8 Service, 843 F.2d 1190, 1195 (9th Cir. 1988) (agency’s failure to comply with the Clean Water
 9 Act rendered EA unlawful and necessitated preparation of an EIS); 40 C.F.R. § 1508.27(b)(10);
 10 see infra at 31-39 (asserting violations of NFMA diversity and viability duties). Second, the
 11 agency has failed to adequately account for the “[u]nique characteristics of the geographic area”
 12 and, relatedly, failed to take the requisite hard look at cumulative impacts to the geographic area.
 13 40 C.F.R. §§ 1508.27(b)(3) (requiring that to determine significance, an agency must consider
 14 unique geographic circumstances), 1508.27(b)(4) (requiring that to determine significance, an
 15 agency must consider “cumulatively significant impacts”).

16 The headwaters of Thomes Creek, where the Divide Auger Timber Sale will take place, is
 17 nestled between the Yolla Bolly – Middle Eel Wilderness and the Buttermilk LSR. The
 18 ecological and biological value of the ancient forests in the Divide Auger project area is, in large
 19 part, predicated on the fact that they provide key ecological and biological connectivity between
 20 the Wilderness and the LSR. AR 3409, 4479; see also supra at 15-17. The Buttermilk LSR, as
 21 the largest, and, in conjunction with the Grizzly LSR, the most important LSR in the Mendocino
 22 National Forest, provides crucial dispersal habitat for late-successional dependent species from
 23 the Grizzly LSR, through the Buttermilk LSR, and into the Yolla Bolly – Middle Eel Wilderness.
 24 In other words, the Buttermilk LSR does not function as an island. Rather, the Buttermilk LSR
 25 functions as part of a network of geographically distributed large LSRs bound together by and
 26 dependent on the presence and proper distribution of late successional dispersal habitat within

1 the matrix lands. AR 3351, 3360. Consequently, the Divide Auger project area is of unique and
2 critical geographic importance.

3 Yet, the Divide Auger Timber Sale threatens this key late-successional habitat link. See
4 supra at 10-17. This conclusion is most pronounced in the context of the Northern Spotted Owl,
5 a species listed as threatened in 1990 pursuant to the ESA. Def. Answer ¶ 36. Northern Spotted
6 Owls rely on two types of habitat: nesting and roosting habitat, and foraging and dispersal
7 habitat.¹¹ The Fish and Wildlife Service recommends 1336 acres of nesting, denning, forage, and
8 dispersal habitat to support each Northern Spotted Owl nesting pair within the Northern Spotted
9 Owl's home range. AR 4467. Within the project area/analysis area there are 4 Northern Spotted
10 Owl ACs, associated 100-acre LSRs, and 1.3 mile radius "homeranges" centered on each AC.¹²
11 AR 4421-4422, 4425-4427.

12 The Divide Auger Timber Sale will eliminate 5 acres of suitable nesting and roosting
13 habitat and 154 acres of suitable foraging and dispersal habitat that "would reduce suitable
14 habitat within three home ranges." AR 4470. Notably, before commercial logging even takes
15 place, two of the home ranges already contain "less than half the recommended acreage to
16 support a nesting pair of owls." Id. Specifically, the homerange centered on AC 1001 "currently
17 consists of only 16 percent suitable habitat," and the homerange centered on AC 1008 "currently
18 consists of only 25 percent suitable habitat." AR 4511. Subsequent to the logging, only "[o]ne
19 home range [1052] would remain above the recommended level of "40% (1336 acres) or more of
20 suitable nesting, roosting, ... foraging [and dispersal] habitat within the [1.3 mile] provincial
21

22
23 ¹¹ Nesting and roosting habitat consists of live trees 21 inches diameter base height or greater with a
24 minimum of 60% canopy closure in timber strata M4G and M6G with an understory demonstrating "multi-layered,
25 uneven-aged conifer and hardwoods." AR 4423. Foraging and dispersal habitat consists of nesting and roosting
26 habitat and M3G, M4P, R4X, and C4X (C4P & C4G) with a minimum of 40% canopy closure. AR 4423; see also
27 AR 4442 (explaining timber strata).

¹² These homeranges, and their associated ACs, and 100 acre LSRs, are numbered 1001, 1008, 1030, and
1052. AR 4425-4426.

radius.”¹³ AR 4425, 4470. “The loss of nesting and foraging habitat could limit the availability of nesting sites, cause further fragmentation within the analysis area, and reduce the availability of dispersal habitat for juvenile owls. Fragmentation would increase the probabilities of predation on spotted owls.” AR 4425 (citation omitted).

Based on these facts, the Wildlife BA concludes that there could be both “direct” and “indirect” effects to the Northern Spotted Owl and therefore the Divide Auger Timber Sale “may adversely affect habitat for the [Northern Spotted Owl].” AR 4429, 4437. This “may affect” determination triggered the Forest Service’s obligation to formally consult with the Fish and Wildlife Service pursuant to section 7 of the ESA. As stated by the Forest Service in its formal Biological Opinion:

The proposed prescriptions will significantly alter the stand structure and forest microclimate to the point that remaining vegetation will neither provide appropriate nest and roost sites nor the sufficient thermal cover necessary to protect spotted owls from temperature extremes. Following timber harvest, these stands may remain unsuitable for approximately 40-50 years before regeneration stands develop the size and structure to provide potential foraging and dispersal habitat for spotted owls, and for at least 80-100 years for replacement of structural conditions characteristic of nesting/roosting habitat.

AR 4511. The Biological Opinion states further that in the specific context of AC 1001, currently limited to 16% suitable habitat, there will be a loss of 59 acres, and “such loss of habitat, particularly within 0.7 miles of an activity center, will exacerbate already poor habitat conditions within this home range, to the point of impairing successful spotted owl reproduction and survival.” AR 4511. Similarly, for AC 1008, currently limited to 25% suitable habitat, the FWS comes to an identical conclusion. AR 4511-4512. The Fish and Wildlife Service eventually concludes that impacts to the Northern Spotted Owl “would not likely jeopardize the continued existence of the northern spotted owl.” AR 4513.

But, as discussed above, simply because the agency has complied with the ESA does not

¹³ Thus, subsequent to logging, only Homerange 1052 would meet the recommended 40% (1336 acres) nesting, roosting, and foraging habitat. AR 4426.

absolve the agency of its duties to take a hard look at environmental impacts and to supply a convincing statement of reasons for why a proposed action will not significantly impact the environment. This is because cumulative impacts analyses conducted by the Fish and Wildlife Service pursuant to the ESA are designed to determine whether a given activity would jeopardize the existence of a listed species or result in the destruction or adverse modification of its critical habitat, and are therefore, by definition extremely broad in scope, but narrowly targeted in purpose. 50 C.F.R. § 402.01; U.S. Fish and Wildlife Service & National Marine Fisheries Service, Endangered Species Consultation Handbook, Procedures for Conducting Consultation and Conference Activities Under Section Seven of the Endangered Species Act at 4-30 to 4-31(March 1998). They do not, however, function as a substitute for project-level cumulative impacts analyses required by NEPA. In other words, the cumulative impacts of a given project – like the Divide Auger Timber Sale – may not lead to a conclusion that a listed species would be *jeopardized*, but, nonetheless, those impacts, for purposes of NEPA, may very well – as here – be *significant* and thus require the preparation of an EIS.

To determine significance, the Forest Service must account for the context of the proposed action – here, a small, but vital parcel of ancient forests that links broader, landscape scale habitat for species dependent on late-successional habitat. Additionally, within that context, the agency must account for the intensity of the impacts caused by the proposed action – here, a commercial logging project that may compromise the diversity and viability of late successional wildlife, compromise the functionality of a unique and key link within the Mendocino National Forest’s interconnected network of LSRs and other protected late successional lands, and cause significant cumulative impacts.¹⁴ Due to the agency’s failure to

¹⁴ The Forest Service incorrectly asserts that “when the LSRs were fully functional, matrix Activity Centers were not required to support the LSRs and effects to them would not affect the viability of the species across its range. [The Buttermilk LSR] is considered to sufficiently provide for owls.” AR 4470. As discussed above, Matrix ACs support the species as a whole through a network of linked late-successional habitat. See supra at 15-16. Thus, the Matrix ACs cannot be so easily dismissed, and, indeed, are critical to the Buttermilk LSR’s functionality.

1 account for these facts, and the agency's dismissive characterization of impacts as
 2 "insignificant," the agency has not supplied a convincing statement of reasons justifying the
 3 FONSI and thus the Divide Auger Timber Sale is unlawful.

4 **C. The Forest Service Failed to Consider a Reasonable Range of Alternatives**

5 **1. The Forest Service's Obligation to Consider a Reasonable Range of Alternatives**

6 The Forest Service's range of alternatives is flawed because the agency failed to consider
 7 a noncommercial, restoration based alternative that relied on understory thinning of small
 8 diameter trees to respond to insect and disease concerns and high fuel loads and fire risk.
 9 Fundamentally, just because this area is matrix land, and just because much of the landscape has
 10 already been altered to the point that it provides only limited and fragmented suitable pockets of
 11 habitat, the agency should not automatically consider only commercial logging alternatives.
 12 Indeed, the fact that the area has been altered should suggest the need to consider a
 13 noncommercial, restoration based alternative. Such an alternative could protect late successional
 14 wildlife and wildlife habitat – in particular habitat connectivity between the Buttermilk LSR and
 15 Yolla Bolly – Middle Eel Wilderness – and thus allow commercial logging to proceed in other
 16 areas without causing unacceptable impacts.

17 Alternatives are the "heart" of the NEPA process. 40 C.F.R. § 1502.14. NEPA obligates
 18 federal agencies to "study, develop, and describe appropriate alternatives to recommended
 19 courses of action in any proposal which involves unresolved conflicts concerning alternative uses
 20 of available resources." 42 U.S.C. § 4332(E); see also § 4332(2)(C)(iii). NEPA's implementing
 21 regulations state further that federal agencies must "[r]igorously explore and objectively
 22 evaluate all reasonable alternatives to a proposed action' so that the agency can 'sharply defin[e]
 23 the issues and provid[e] a clear basis for choice among options by the decisionmaker and the
 24 public.'" Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1120 (9th Cir. 2002) (quoting 40
 25 C.F.R. § 1502.14). Notably, the agency's duty to consider alternatives "is both independent of,
 26 and broader than," its duty to complete an environmental analysis. Bob Marshall Alliance v.

1 Hodel, 852 F.2d 1223, 1229 (9th Cir. 1988).

2 In considering a reasonable range of alternatives, “[t]he stated goal of a project
3 necessarily dictates the range of ‘reasonable’ alternatives and an agency cannot define its
4 objectives in unreasonably narrow terms.” City of Carmel-By-The-Sea, 123 F.3d at 1155.
5 Ensuring that the agency does not unreasonably constrain its choices by identifying narrow
6 objectives – i.e., the purpose and need – before actually developing and analyzing alternatives is
7 particularly critical given that “[NEPA] sets forth procedural mechanisms to ensure proper
8 consideration of environmental concerns, it does not mandate particular substantive results.” Id.
9 at 1150 (citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,
10 Inc., 435 U.S. 519, 558 (1978)). This is reinforced by the requirement that NEPA’s procedures
11 are to be “strictly interpreted ‘to the fullest extent possible’ in accord with the policies embodied
12 in the Act” Center for Biological Diversity, 349 F.3d at 1166 (citations omitted).

13 **2. The Forest Service’s Unreasonable Range of Alternatives**

14 The Divide Auger EA, in addition to its “no action” alternative, considered two action
15 alternatives. Each of these alternatives involved commercial logging. AR 4601 (Alternative B),
16 4604 (Alternative C). The Forest Service never considered a completely noncommercial,
17 restoration based alternative. Effectively, the agency’s consideration of action alternatives has
18 resulted in a situation where the decision – commercial logging – was preordained. In so doing,
19 the agency narrowed its analysis to the point that it did not “‘sharply define the issues’” and did
20 not provide itself, or the public, with a “‘clear basis for choice.’” Kootenai Tribe of Idaho, 313
21 F.3d at 1120 (quoting 40 C.F.R. § 1502.14).

22 By adamantly refusing to consider a noncommercial, restoration based alternative, the
23 Forest Service has tied its hands. The agency justifies its refusal by stating:

24 The first purpose and need is to “Provide an adequate supply of timber supply that
25 contributes to the economic stability of rural community by generating economic
26 activity, income and employment.” An alternative where small diameter trees are
removed fails to meet this purpose and need for action.

1 AR 4654. This justification, however, has two major flaws.

2 First, agencies may not decline to evaluate an alternative simply on the grounds that it is
 3 not a “complete solution” to the agency’s goals. Natural Resources Defense Council v. Morton,
 4 458 F.2d 827, 836 (D.C. Cir. 1972) (agency should not “disregard alternatives merely because
 5 they do not offer a complete solution to the problem”); Citizens Against Toxic Sprays v.
 6 Bergland, 428 F. Supp. 908, 933 (D. Or. 1977) (same). Agencies may only reject an alternative if
 7 it is “unreasonable” – i.e., either remote or speculative, or infeasible or impractical – and here,
 8 the record does not demonstrate, beyond the claim that it would not provide commercial timber,
 9 that a noncommercial, restoration based is remote, speculative, infeasible, *or* impractical. See
 10 Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 814 (9th Cir. 1999) (citations
 11 omitted) (agency need not consider alternatives that are “remote and speculative”); Forty Most
 12 Asked Questions Concerning CEQ’s NEPA Regulations, 48 Fed. Reg. 18,026 (March 16, 1981)
 13 (“[i]n determining the scope of alternatives to be considered, the emphasis is on what is
 14 ‘reasonable’ rather than on whether the proponent or applicant likes or is itself capable of
 15 carrying out the particular alternative. Reasonable alternatives include those that are practical or
 16 feasible from a technical and economic standpoint and using common sense, rather than simply
 17 desirable from the standpoint of the applicant”). Thus, the Forest Service’s fixation on providing
 18 commercial timber and consequent failure to consider a noncommercial, restoration based
 19 alternative is fatal to the validity of the Divide Auger EA. See, e.g., Idaho Conservation League
 20 v. Mumma, 956 F.2d 1508, 1519-20 (9th Cir. 1992) (“[t]he existence of a viable, but unexamined
 21 alternative renders an environmental impact statement inadequate” (quoting Citizens for a Better
 22 Henderson v. Hodel, 758 F.2d 1051, 1057 (9th Cir. 1985))).

23 Second, the agency has inconsistently applied its logic – albeit incorrect logic – that
 24 because a given alternative does not meet every single purpose and need, then it need not be
 25 considered during the NEPA process. Both action alternatives include commercial logging in the
 26 southern units. However, “[i]nsects and disease within the southern Divide Auger units is

1 minimal.” AR 4634. Thus, the commercial logging of the southern units would not meet the
 2 goal of the project to minimize the spread of insect and disease pathogens. AR 4595. The
 3 agency states that the reason commercial logging of the southern units was included in
 4 Alternative B was “to address the first purpose and need to supply an adequate, cost efficient
 5 timber supply to the local community.” AR 4654. Therefore, while the agency finds itself fit to
 6 reject a noncommercial, restoration based alternative because it does not satisfy one of four
 7 factors of its purpose and need, this single factor alone is apparently sufficient to justify the
 8 commercial logging of the southern units in Alternative B.

9 The agency’s actions – and inconsistent use of the EA’s purpose and need to identify and
 10 select a reasonable range of alternatives – leads to the inescapable conclusion that the alleged
 11 concerns about insects and disease and fuels and fire risk are merely opportunistic means to an
 12 end – commercial logging of late successional ancient forests. The agency’s desire to
 13 commercially log the Divide Auger, however it may comport with the agency’s discretion to
 14 determine how matrix lands are ultimately managed, does not obviate the agency’s duty to
 15 consider a noncommercial, restoration based alternative. For these reasons, the Divide Auger
 16 Timber Sale is unlawful.

17 **D. The Forest Service’s Failure to Diligently Involve the Public**

18 The Forest Service failed to comply with its duty to diligently involve the public in the
 19 preparation of the Divide Auger EA. The CEQ regulations implementing NEPA require the
 20 Forest Service to “[m]ake diligent efforts to involve the public in preparing and implementing
 21 their NEPA procedures” and to “[e]ncourage and facilitate public involvement.” 40 C.F.R. §§
 22 1500.2(d), 1506.6(a). The public cannot provide informed input if the agency selectively
 23 provides information, and postures – as here – a decision in a light designed to avoid scrutiny.

24 The Ninth Circuit generally finds an EA sufficient so long as the agency takes a “hard
 25 look at the issues and responds to reasonable opposing viewpoints.” Earth Island Institute, 351
 26 F.3d at 1301 (citing 40 C.F.R. §§ 1502.9(a), (b)). As part of this duty, the Forest Service must

1 ensure that “the public receive the underlying environmental data from which a Forest Service
 2 expert derived her opinion.” Idaho Sporting Congress v. Thomas, 137 F.3d at 1150. The Forest
 3 Service “must also ‘identify any methodologies used’ and ‘make explicit reference by footnote to
 4 the scientific and other sources relied upon for conclusions in the [EA].” Earth Island Institute,
 5 351 F.3d at 1301 (quoting 40 C.F.R. § 1502.24); See also Sierra Club v. Bosworth, 199
 6 F.Supp.2d at 980.

7 However, an agency cannot blithely rely on evidence in the administrative record that is
 8 not openly and publicly assessed within the NEPA document itself simply because the NEPA
 9 document cites the evidence. See Robertson v. Methow Valley Citizens, 490 U.S. 332, 349
 10 (1989) (NEPA “guarantees that the relevant information will be made available to the larger
 11 audience that may also play a role in both the decisionmaking process and the implementation of
 12 that decision”). As stated by the Ninth Circuit, “we have not established a minimum level of
 13 public comment and participation ... governing the EA and FONSI process” Citizens for
 14 Better Forestry v. U.S. Department of Agriculture, 341 F.3d 961, 970 (9th Cir. 2003). Therefore,
 15 whether the agency has actually provided for diligent public participation depends on the nature
 16 of the decision being considered.

17 Here, the fact that the Divide Auger EA gives impacts related to three critical issue areas
 18 “second class” status – wildlife and wildlife habitat, fuels and fire risk, and roads – demonstrates
 19 that the agency has not adequately provided for public participation.¹⁵ For these three issue areas,
 20 the Forest Service buried its analysis within internal specialist reports, some of which – those
 21 pertaining to roads – were not even developed as part of the Divide Auger Timber Sale. For
 22 wildlife and wildlife habitat, the Forest Service completed three reports: the Wildlife BA, MIS
 23

24 ¹⁵ The EA itself does summarize impacts related to wildlife and wildlife habitat and fuels and fire risk in
 25 two locations. First, within the EA’s rationale for why these issues are not cumulatively significant. AR 4645 (fuels
 26 and fire risk), 4646 (wildlife and wildlife habitat). And, second, in the Forest Service’s response to public
 27 comments. AR 4655, 4669-4670 (fuels and fire risk), 4655, 4663-4664, 4668, 4672 (wildlife and wildlife habitat).
 These sections, however, are entirely conclusory. The “meat and potatoes” of the analysis is, as stated, relegated to
 specialist reports never subjected to public review or comment.

1 Report, and Wildlife BE. For fuels and fire risk, the Forest Service completed the Divide Auger
 2 Fuels Analysis. For roads, the Forest Service relies on the 1998 Road BA, its two addendums,
 3 and the 2001 Road BE. Each of these issues, however, are of critical concern and should have
 4 been considered as potentially significant and thus specifically addressed by the EA. See supra at
 5 20-25 (arguing that Forest Service failed to supply a convincing statement of reasons why
 6 impacts were insignificant).

7 However, the public was never afforded the opportunity to review and comment on these
 8 analyses. While these analyses were eventually made available, EPIC only received these
 9 analyses after submitting formal Freedom of Information Act (“FOIA”) requests. See AR 3984
 10 (EPIC FOIA request of 4/10/02), 4002 (EPIC FOIA request of 5/22/02), and 4390 (EPIC FOIA
 11 request of 12/5/2002). Given that the 30-day review and comment period provided for the
 12 revised draft Divide Auger EA was initiated on November 6, 2002, and given that EPIC, because
 13 of the timing of its FOIA request (December 5, 2002, AR 4390), and the normal 20-day FOIA
 14 response time (5 U.S.C. § 552(a)(6)(A)(i)), did not receive a response to its request for several of
 15 these internal agency analyses until December 20, 2002 (AR 4392), and, indeed, several of these
 16 analyses were not yet available (AR 4392), EPIC, let alone the public, was never able to
 17 effectively participate in the Divide Auger NEPA process.¹⁶

18 The Forest Service’s obligation to consider these issues in the body of the EA – and to
 19 thereby subject its analysis to public review and comment – is important for two reasons. First,
 20 by dismissing these issues as insignificant, and burying analyses in specialist reports, it was far
 21 easier for the Forest Service to disregard the public’s concerns and to drown the public with
 22

23 ¹⁶ Notably, the wildlife specialist reports were finalized *after* the Forest Service requested comments on the
 24 draft Divide Auger EA on November 6, 2002. AR at 4314. For example, the Biological Assessment for wildlife was
 25 not completed until March 25, 2003. AR at 4411. The Wildlife Specialist’s Report – which constitutes the Forest
 26 Service’s MIS report for the Divide Auger Timber Sale – was not completed until April 3, 2003. AR at 4447. The
 27 Biological Evaluation for wildlife was not completed until June 6, 2003 – the same exact day the DN/FONSI was
 signed. AR at 4530. Additionally, the Fish and Wildlife Service’s Biological Opinion was not completed until June
 4, 2003. AR at 4489. In effect, the Forest Service deemed wildlife issues insignificant and thus not deserving of
 detailed analysis within the EA before its own specialists had the opportunity to weigh in with their final results.

conclusory responses to comments that cite analyses the public was never afforded an opportunity to review and critique. Second, the Forest Service did not benefit from the considerable knowledge that members of the public – such as EPIC – have with regard to these issues. As stated by the Ninth Circuit, in resolving an analogous situation:

While NEPA empowers neither the plaintiffs nor this court to second-guess the [agency's] management direction, it does require the [agency] to articulate, publicly and in detail, the reasons for and likely effects of those management decisions, and to allow public comment on that articulation.

Kern, 284 F.3d at 1073 (holding that agency guidelines never subjected to NEPA did not excuse agency from its responsibility under NEPA to perform an analysis of effects). Given NEPA's unequivocal mandate to diligently involve the public, and for the above stated reasons, it therefore cannot be said that the Forest Service diligently involved the public in the preparation of the Divide Auger EA and thus the Divide Auger Timber Sale is unlawful.

II. THE DIVIDE AUGER TIMBER SALE VIOLATES NFMA

A. The Forest Service's Duty to Ensure Species Diversity and Viability

NFMA establishes a two-stage forest planning process. At the first stage, the Forest Service prepares a "Land and Resource Management Plan," or, more simply, a 'Forest Plan.' 16 U.S.C. § 1604; 36 C.F.R. §§ 219.10(a)-(b) (1982).¹⁷ Once a Forest Plan is in place, the Forest Service implements the Forest Plan by proposing and assessing individual site-specific projects – such as the Divide Auger Timber Sale – that must be consistent with the Forest Plan. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10(e). In preparing and implementing Forest Plans, the Forest Service must "provide for diversity of plan and animal communities...." 16 U.S.C. § 1604(g)(3)(b). This provision is implemented by the Forest Service through its planning regulations, which dictate that:

Fish and wildlife habitat shall be managed to maintain viable populations of

¹⁷ The status of the Forest Service forest planning regulations – the "219" regulations – is currently in flux. However, the planning regulations promulgated in 1982 control this case. These regulations can be found at <<<http://www.fs.fed.us/emc/nfma/includes/nfmareg.html>>> (last visited April 14, 2004).

existing native and desired non-native vertebrate species in the planning area. For planning purposes, a viable population shall be regarded as one which has the estimate numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area. In order to insure that viable populations will be maintained, habitat must be provided to support, at least, a minimum number of reproductive individuals and that habitat must be well distributed so that those individuals can interact with others in the planning area.

36 C.F.R. § 219.19. “This duty to ensure viable, or self-sustaining, populations, applies with special force to “sensitive” species. Inland Empire Public Lands Council v. U.S. Forest Service, 88 F.3d 754, 759 (9th Cir. 1996) (citation omitted). Furthermore, the Forest Service’s “viability” duty applies equally at both the Forest Plan and site-specific project level. Id. at 760 n.6.

B. MIS in the Mendocino National Forest

To comply with its NFMA diversity obligations, as implemented through the viability regulation, the Forest Service identifies “Management Indicator Species” (“MIS”). MIS were selected in the Mendocino National Forest for two reasons. First, because they “are believed to represent the vegetation types, successional stages, and special habitat elements necessary to provide for viable populations of all species in the Forest.” AR 1982. Second, because MIS “*population* changes are believe to indicate or represent the effects of management activities on wildlife and fish.” Id. (emphasis added); see also 36 C.F.R. 219.19(a)(1) (MIS selected because “*population* changes ... indicate the effects of management activities” (emphasis added)). Thirteen MIS wildlife species were designated in the Mendocino National Forest: the Acorn Woodpecker, Bald Eagle, Black-tailed Deer, California Thrasher, Douglas Tree Squirrel, Pacific Fisher, Northern Goshawk, American Marten, Peregrine Falcon, Pileated Woodpecker, Northern Spotted Owl, Tule Elk, and Western Gray Squirrel. AR 1984. These MIS thus function as a bellwether – i.e., proxy – for the health of all of the Mendocino National Forest’s 329 vertebrate wildlife species (16 amphibian, 21 reptilian, 70 mammalian, 204 avian, and 18 fish). AR 1982.

C. The Forest Service’s Failure to Comply with its Viability Duties

1. Concerns over Northern Goshawk, American Marten, Pacific Fisher, and Northern Spotted Owl Viability

1 According to the Wildlife BE, the Divide Auger Timber Sale could have direct and
 2 indirect effects to MIS, in particular Northern Goshawk (AR 4545), American Marten (AR 4549),
 3 and Pacific Fisher (AR 4552). Additionally, the Wildlife BA, triggering its duty to engage in
 4 formal consultation with the Fish and Wildlife Service, determined that the Divide Auger Timber
 5 Sale “may adversely affect habitat for the northern spotted owl.” AR 4437. Each of these MIS
 6 was selected for their association and dependence on old growth and late-successional forests,
 7 dead and down trees, and, except for the Northern Spotted Owl, riparian areas. AR 1984. Given
 8 the impacts of the Divide Auger Timber Sale to these species, and their association and
 9 dependence on late successional forests such as those threatened here, the Forest Service should
 10 be especially cognizant of how the Divide Auger Timber Sale affects these species’ viability.

11 Unfortunately, for these MIS, the Forest Service lacks population data. For the Northern
 12 Goshawk, the Forest Service completed only a single survey for a single logging unit – Unit 21 –
 13 in 2002. AR 4474. For American Marten and Pacific Fisher, the Forest Service completed no
 14 surveys and the only data pertaining to actual locations or populations of these species is based on
 15 “[g]eneral furbearer track plate surveys ... conducted in portions of the Forest in 1993 and 2000.”
 16 AR 4476. For the Northern Spotted Owl, while there is up-to-date survey information for the
 17 southern logging units, the northern logging units are “not considered to be currently surveyed.”
 18 AR 4469. In sum, only logging unit 21 for the Northern Goshawk, and the southern units for the
 19 Northern Spotted Owl, contain adequate data sufficient to support a viability determination.

20 The Forest Service, however, disagrees, stating in its response to comments that:

21 [u]nder the LRMP dated February 1995, viable populations of [MIS] will be
 22 provided for by “maintaining moderate to high habitat capability, as described by
 23 the habitat capability models found in Appendix E of the Forest Plan” (page IV-42
 24 Mendocino LRMP). Although species population counts are collected on the
 forest, impacts to the MIS population is based on the types and amount of habitat
 that currently exists throughout the forest. When available, population counts are
 also considered along with surveys

25 AR 4668. This characterization – referred to as the “proxy on proxy” approach because it uses
 26 habitat as a ‘proxy’ to determine whether viability of MIS ‘proxy’ is ensured – is, however, only

1 partially accurate and, regardless, an insufficient means of ensuring viability in the Divide Auger.

2 **2. The Forest Service's Monitoring Duties in the Mendocino National Forest**

3 The Forest Service's characterization is only partially accurate because while the Forest
4 Plan generally ensures viability through the protection of suitable habitat outlined in a "Wildlife
5 Habitat Capability Model," AR 2110, the Forest Plan also ensures viability by imposing explicit
6 monitoring obligations for MIS species. AR 2081; see also 36 C.F.R. §§ 219.19(a)(1) &
7 219.11(d) (stating that a Forest Plan must establish "[m]onitoring and evaluation requirements
8 that will provide a basis for a periodic determination and evaluation of the effects of management
9 practices"). These monitoring obligations are critical because MIS species can only be used as
10 indicators of forest-wide species viability if MIS population changes can be correlated with
11 changes in habitat.

12 On two counts, there is absolutely no evidence in the record indicating that the agency has
13 actually complied with these monitoring duties. First, the Forest Plan requires the agency to
14 "[e]valuat[e] ... all activities with the potential to cause changes in habitat capability for [MIS]." AR 2098. The agency must comply with this objective at the project level and provide an "annual
15 summary." Id. Nothing in the record indicates that these annual summaries were prepared or
16 integrated into the Divide Auger Timber Sale. Second, the Forest Plan requires the agency "[t]o
17 assess whether MIS populations are being affected; to determine that selected MIS are
18 appropriate; and to determine whether standards and guidelines are effective." Id. This
19 monitoring requirement is met by evaluating the most recent inventory data and comparing that
20 data to the Wildlife Habitat Capability Models for two species per year on a rotating basis. Id.
21 Again, nothing in the record indicates that these annual MIS assessments were prepared or
22 integrated into the Divide Auger Timber Sale. These two failures strongly suggest that the
23 agency, by simply relying on the Wildlife Habitat Capability Models for MIS, without also
24 validating the Models by complying with its monitoring obligations, is flying blind by proceeding
25 with the Divide Auger Timber Sale and, by acting inconsistent with the Forest Plan, not ensuring
26

1 the diversity and viability of late successional wildlife. 16 U.S.C. § 1604(i); 36 C.F.R. §
2 219.10(e).

3 **3. The Proxy on Proxy Approach**

4 Simply relying on habitat as a proxy for ensuring viable populations of vertebrate species
5 is inherently suspect and, in many instances, unlawful. See Idaho Sporting Congress v.
6 Rittenhouse, 305 F.3d 957 (9th Cir. 2002) (establishing presumption against use of “proxy on
7 proxy” approach unless sufficiently justified, and holding that Forest Service’s use of “proxy on
8 proxy” approach was unlawful). This is because MIS are identified expressly because they allow
9 the Forest Service to gauge the overall health and trends of other species within the forests
10 without incurring the time and expense of studying each species individually. 36 C.F.R.
11 219.19(a)(1); see Inland Empire, 88 F.3d at 762 n.11. Moreover, the Forest Service’s regulations
12 require that “[p]opulation trends of the [MIS] ... be monitored and relationships to habitat changes
13 determined.” 36 C.F.R. § 219.19(a)(6); see also id. at § 219.12(d) (“each Forest Supervisor shall
14 obtain and keep current inventory data appropriate for planning and managing the resources under
15 his or her administrative jurisdiction”). The reason that it is necessary in most circumstances to
16 collect quantitative data concerning population data – both actual and trend – was articulated by
17 the Federal District Court for the District of New Mexico:

18 [MIS] represent a management short-cut – they are those species selected for their
19 bellwether characteristics and whose populations generally can be quantitatively
20 ascertained and monitored Consequently, there is generally no reason to further
short-cut the management monitoring process by relying on habitat trends to
project [MIS] species population data.

21 Forest Guardians v. Forest Service, 180 F.Supp.2d 1273, 1281-1282 (D. N.M 2001) (holding that
22 “the Forest Service is obligated by the plain language of NFMA’s implementing regulations to
23 acquire and analyze hard population data of its selected [MIS] ... [and] it may not rely solely on
24 habitat trend data as a proxy for population data or to extrapolate population trends”); see also
25 Sierra Club v. Martin, 168 F.3d 1 (11th Cir. 1999) (holding that Forest Service had obligation to
26 collect population data, not just habitat trend data, for MIS).

1 The Ninth Circuit has held that a “proxy on proxy” approach *may* be lawful in *limited*
 2 instances. Inland Empire, 88 F.3d at 763 & 763 n.12 (holding that it was lawful to “estimate[] the
 3 effects of the alternatives on the population of [MIS] by analyzing the amount of the species’
 4 habitat that would be reduced by each alternative” where “there is no technically reliable and cost-
 5 effective method of counting individual members of the [MIS]”). Notably, the Ninth Circuit has
 6 clarified its holding in Inland Empire. In Rittenhouse, the Ninth Circuit limited Inland Empire to
 7 its facts, stating that population data is required unless the agency can establish a sufficient
 8 justification for not collecting and utilizing such data. Rittenhouse, 305 F.3d at 972-973. Inland
 9 Empire’s decision to uphold the use of “proxy on proxy” was based on the fact that “[t]he [Forest]
 10 Service specifically found that for the smaller, more reclusive species, ... there is no technically
 11 reliable and cost-effective method of counting individual members of the species.” Inland
 12 Empire, 88 F.3d at 763 n.12; see also Utah Environmental Congress v. Zieroth, 190 F.Supp.2d
 13 1265, 1271 (D. Ut. 2002) (distinguishing Inland Empire on basis that MIS were not “reclusive”
 14 and finding that failed to provide “any documentation or record evidence that the [MIS]
 15 population data ... could not have been reliably collected by the Forest Service”), Forest
 16 Guardians, 180 F.Supp.2d at 1282 n10 (stating, “[u]nlike ... Inland Empire, the Forest Service is
 17 not claiming here that any of the relevant [MIS] are reclusive, rare, or otherwise impractical to
 18 survey”).

19 Nothing in the administrative record demonstrates that the Northern Goshawk, American
 20 Marten, Pacific Fisher, or Northern Spotted Owl are “reclusive” and that “there is no technically
 21 reliable and cost-effective method” of collecting site-specific population data and this alone
 22 invalidates the Forest Service’s viability determinations. Id. Additionally, for several reasons, the
 23 administrative record demonstrates that the Divide Auger Timber Sale is more analogous to the
 24 situation in Rittenhouse where a monitoring report completed by the Forest Service indicated that
 25 the Forest Plan’s proxy on proxy approach was “invalid.” Rittenhouse, 305 F.3d at 967.

26 First, as discussed above, the Forest Service has not demonstrated compliance with its

1 Forest Plan monitoring objectives. See supra at 33-35.

2 Second, the Forest Service has not taken a hard look at the cumulative impacts of the
3 Divide Auger Timber Sale to late successional wildlife and wildlife habitat – in particular, habitat
4 fragmentation and degradation to habitat that provides key connectivity between the Buttermilk
5 LSR and the Yolla Bolly – Middle Eel Wilderness. See supra at 10-17.

6 Third, as stated by the Thomes Creek Watershed Analysis, for many species within the
7 area, including Northern Goshawk, American Marten, and Northern Spotted Owl, “there are not
8 sufficient data to determine either population counts within the watershed, or total amounts of
9 potential habitat.” AR 2652. Additionally, the Watershed Analysis states that:

10 Collection of data on late-successional wildlife species on the Mendocino
11 National Forest has been limited to monitoring of threatened and endangered
12 species for compliance with Section 7 of the Endangered Species Act (ESA), and
13 Research, Development, and Application (RD&A) inventories The present
14 analysis is limited by this lack of data and caution should be used when
interpreting these data to determine future management activities. Additionally,
knowledge of habitat characteristics selected for by northern spotted owls in this
watershed is limited; the gathering of additional data in the future will assure
better habitat management.

15 AR 2684-2685. These passages indicate that not only is data concerning the relationship of MIS
16 *populations* as correlated to habitat lacking, but that concrete data concerning *habitat* is also
17 lacking, thereby undermining blind reliance on a “proxy on proxy” approach to ensuring viability.

18 Fourth, the agency’s position that it is ensuring viability and that impacts would not be
19 significant by protecting sufficient habitat in the Thomes Creek Watershed through, in part,
20 compliance with its 15% old growth and late-successional retention standard is not supported by
21 the record. See e.g., AR 4648 (stating that “retaining 15% of the overstory trees within all timber
22 harvest units will maintain habitat for individual species utilizing mature/over-mature forests and
23 snag habitats”). In the Wildlife BA, the Forest Service admits that the retained trees in several
24 logging units (T2, S15, T20, and T21) “do[] not appear to meet the retention standards stated in the
25 [Forest Plan], [but] due to stand conditions, this mixture meets the intent of the plan.” AR 4415.
26 Compliance with the “intent” of the Forest Plan is apparently justified based on the assertion in

1 the Wildlife BA that “the large diameter trees retained within the M4P are equivalent to those in
2 M4G in terms of quality. The only difference between the M4P stands and the M4G stands are
3 the density, rather than size, of the trees.” AR 4415.

4 Yet this equivalency is undermined by the fact that suitable nesting and roosting habitat
5 for the Northern Spotted Owl “consists of M4G and M6G [stands with] a minimum of 60%
6 canopy closure” and suitable foraging habitat consists of “nesting” and “M3G, M4P, R4X, and
7 C4X (C4P & C4G) with a minimum of 40% canopy closure.” AR 4423. Similarly, for American
8 Marten and Pacific Fisher, suitable habitat consists of, in relevant part, “D4X, M3G, M4G, M6G,
9 and R4X” with a “canopy closure not less than 40%.” AR 4475. Turning to the agency’s
10 explanation of timber strata, the specific difference between M4P and M4G is that M4P stands
11 have a crown closure 20-39%, while M4G stands have a crown closure of 40% and above. AR
12 4442. Thus, the agency’s partial rationale for why it met its hard look duty – that it is retaining
13 15% of the trees within each logging unit – does not pass muster because the retained trees do not
14 satisfy the canopy closure requirements for Northern Spotted Owl, American Marten, or Pacific
15 Fisher, and do not conform to the Forest Plan’s retention standards. The agency should have been
16 forewarned given the fact that the Thomes Creek Watershed Analysis states that “[t]he ... M4P ...
17 timber strata ... may not provide habitat for ... late-successional associated species that were
18 intended to be assured habitat under the 15 percent late-successional standard.” AR 2686.

19 Fifth, and finally, in the specific context of Northern Goshawk, the Forest Plan specifically
20 states that “[i]nventory of [lands outside of LSRs and other reserved lands – i.e., matrix lands]
21 will be completed as a part of project planning.” AR 2028. This data is necessary to ensure
22 compliance with several Northern Goshawk-specific management protections obligating the
23 Forest Service to: (1) establish primary nest zones around last known nests, and maintain 60% of
24 that nest zone (300 acres) in dense mature forest cover; (2) establish a foraging habitat zone of a
25 1.0 mile radius circle (1506 acres) centered on the primary nest zone within which to maintain
26 60% (900 acres) in a mosaic of mid-mature to late successional forest condition; and (3) restrict

1 habitat modifying activities between March 1st and August 31st within primary nest zones, and
2 restrict loud and/or continuous noise within 14 miles of active nest sites during the same timer
3 period. AR 2028. Thus, in the context of the Northern Goshawk, outside of logging Unit 21
4 where the Forest Service did complete a survey in 2002, the agency has not ensured the viability
5 of the species because it has not collected population data, and, in so doing, has effectively done
6 an “end run” around its Forest Plan obligations designed expressly to protect this species.

7 Because the Forest Service cannot demonstrate that there is no technically reliable and
8 cost-effective method to collect population data for Northern Goshawk, American Marten, Pacific
9 Fisher, and Northern Spotted Owl throughout the analysis area for the Divide Auger Timber Sale,
10 and because the evidence in the record points to a definitive need to obtain such population data to
11 validate the Forest Plan’s approach to ensuring viability, and to ensure that substantive protections
12 are implemented, the Divide Auger Timber Sale is unlawful.

13 CONCLUSION

14 Severe procedural and substantive flaws within the decisionmaking process for the Divide
15 Auger Timber Sale render the decision to proceed with commercial logging unlawful. Reduced to
16 their essence, these flaws reflect the agency’s fixation on commercial logging at the expense of
17 our National Forests. If the Forest Service desires to rely on commercial logging, it must
18 understand that this does not obviate – and indeed, here, enhances – the need to take a hard look at
19 cumulative impacts, adequately justify its FONSI, consider a reasonable range of alternatives,
20 diligently involve the public, and ensure the diversity and viability of the wildlife species that call
21 the Mendocino National Forest home.

22 For all of the foregoing reasons, the decision to proceed with the Divide Auger Timber
23 Sale is “arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the
24 law” and “without observance of procedure required by law.” 5 U.S.C. §§ 706(2)(A), (D).
25 Plaintiff therefore respectfully requests that this Court grant its motion for summary judgment and
26 injunctive relief. The Forest Service should be enjoined from any further implementation of the

1 Divide Auger Timber Sale pending a demonstration that the agency has complied with its duties
2 under NEPA and NFMA.

3
4 Respectfully submitted this 14th day of April, 2004,

5
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9
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